BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

References to the opinions of the courts below and the grounds of jurisdiction, as well as a statement of the case and specifications of error to be urged are contained in the petition and will not here be repeated.

POINT I.

The documentary evidence shows that the sale was completed in California.

The "sale order" (R. 102) indicates the sale was to Washington Gray in Los Angeles. The notice of confirmation of sale (R. 104) was sent to Washington Gray in California from California and says: "* * * we are pleased to confirm sale to you * * * Disposition will be made in accordance with your instructions". The purchaser's letter enclosing payment in full (R. 105) directs the issuance of certificates of stock and their delivery "to *your New York office* for my account for safe keeping" (emphasis supplied). This letter was sent from California to "National City Company" in California. The form supplied by seller (R. 106) for filling in by buyer had a space to be filled in after the words "When the certificates are ready kindly forward to" and this space was filled in by Washington Gray to read: "National City Company (*Head Office*) New York City, for safe keeping & subject to my order" (emphasis supplied). Purchaser was a resident of Minnesota (R. 105, 106). He had a safekeeping account with The National City Company of New York (R. 220). The seller in transmitting

the certificates bought by buyer to its New York office for safekeeping acted as the agent of the buyer and the effect was the same as if the certificates had been delivered to buyer in California and forwarded by buyer himself to New York for safekeeping.

POINT II.

The decision in *Robbins* v. *Pacific Eastern Corporation*, 8 Cal. (2) 241, solely relied on by the Circuit Court of Appeals for its reversal of the verdict in Petitioner's favor is not authority for the reversal.

In the *Robbins* case there was no sale but an exchange of securities; the facts demonstrating the identity of the principal (the New York company, here) with the agent (the California company, here) were not present in the *Robbins* case; and there was there no completion of a sale by payment in that case (because there was only an exchange) as there was in this. The court in that case stated that the voluminous papers "indicate that the parties intended title to pass only upon such delivery" of the exchanged stock in New York, whereas here it was obviously intended that title would pass upon payment in California and anything done thereafter was purely in relation to safekeeping of the subject matter of the sale. A reading of the 45 pages of the opinion in the *Robbins* case discloses that any phraseology in the course of the long opinion which might indicate that a sale such as that here involved was consummated outside California, is dictum.

POINT III.

The sound and prevailing decisions of the California courts are to the effect that a sale such as that in the case at bar should be held to have been completed in California in order to prevent easy avoidance of the Corporate Securities Act of that State.

Without regard to the Corporate Securities Act of California there can be no doubt, from the following decisions of the California courts, that a sale of stock is completed upon the acceptance of an offer to sell.

In 18 Corpus Juris Secundum, under the title "Corporations", Sections 409 and 410 (a), it is said in part:

> "Where, however, the title to personal property sold or exchanged passes whenever the parties agree on a personal transfer and the article is identified, it is not essential to a valid sale of corporate stock that the stock certificates be delivered simultaneously with the payment of the purchase price" (citing *Mason* v. *Lievre*, 145 Cal. 514—1914).
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> "The ownership of shares of stock passes from the seller to the buyer by force of the contract of sale, and not by operation of law, and, where the contract of sale is executed, the property in the shares sold, in the absence of fraud, passes, as between the seller and purchaser, to the purchaser" (citing *Schaefer* v. *United Bank & Trust Co. of California*, 104 Cal. App. 635 (1930), and *Lewin* v. *Hanford*, 169 P. 242, 35 Cal. App. 30), "although the certificates remain in the seller's possession" (citing *Cortelyou* v. *Imperial Land Co.*, 156 Cal. 373—1904).

In *Young* v. *New Pedrara Onyx Co.*, 48 Cal. App. 1, the facts were that one Blockman orally offered to sell and

deliver to a California company the entire capital stock of a Mexican company (100 shares) and receive in exchange the entire capital stock of the California company—100,000 shares. This offer was accepted. Thereupon Blockman offered the California company the option to repurchase all of its stock for $160,000, which was accepted. On July 7, 1906, Blockman signed and delivered to the California company a confirmation of his original offer of exchange of stock of the Mexican company for stock of the California company, with a paragraph about the optional right of repurchase, etc. Certificates for all the California company's shares were made out in Blockman's name but remained in the manual possession of the company. The court said in part:

> "Shares of stock are personal property, and there is no reason why, *as between the parties*, they cannot be transferred as any other personal property. * * * A share of stock being an incorporeal right, incapable of manual delivery, and the certificate being nothing more than evidence of its existence, it is obvious that, in the absence of any controlling statutory inhibition, the shares, without an assignment or delivery of the certificate, may be assigned in any manner appropriate to the transfer of incorporeal personal property, as, for example, by a bill of sale, or any mode that will suffice to pass title to a chose in action or intangible property. The *jus disponendi* in shares of stock is an incident of ownership and may be exercised in any manner not prohibited by law (citations). * * * the mode adopted by the California company and Blockman on July 3, 1906, confirmed by Blockman's written instrument of July 7, 1906, was sufficient, as between the parties thereto, to transfer to the California company whatever title Blockman may then have had in the 100 shares, or any of them."

The facts in *Crocker* v. *Crocker*, 84 Cal. App. 114 (1927), were that stock stood in the name of a partnership which was dissolved. The uncontradicted testimony of one of the two partners was that the stock in question on dissolution was to be his. It was pledged with a bank for a partnership loan. The court said in part:

> "The point is made by the plaintiff that the purported transfer of the stock by Crocker Brothers to Warren Crocker was invalid because the stock was not formally assigned to the latter. The point is not maintainable as between the parties themselves—that is, as between the transferor and transferee—a transfer of shares of stock of a corporation may be effected by any of the several modes whereby personal property of a different species may be transferred. * * *"

In *Schaefer* v. *United Bank & Trust Co.*, 104 Cal. App. 635 (1930), the facts were that Schaefer signed an assignment of his stock in a corporation which was represented by a receipt therefor by an institution holding it in connection with a merger of that company and another into a new company and the receipt so endorsed or assigned was sent to another bank with a draft on the purchaser for delivery against honor of the draft. It was disputed whether Schaefer signed the draft. Schaefer sued to get back his stock and any stock in the new company to which it entitled him. The court said in part:

> "Appellant" (Schaefer) "contends that the evidence does not support the finding that there was a sale of the stock. * * * Appellant, having made a sale of his stock and the purchase price having been paid to his agent, it appears to the court that the fact that he did not sign the aforesaid draft * * * did not in anywise affect the validity of said sale. * * *"

In *Cortelyou* v. *Imperial Land Co.*, 156 Cal. 373 (1909), the facts were that plaintiff bought from defendant shares

of its stock which stood in the name of Ferguson, its general manager, and paid the agreed price, it being agreed it should be held by a voting trustee, a copy of the certificates of stock with the pooling agreement endorsed thereon to be delivered to plaintiff. No such certificates were issued and the stock continued in the name in which it stood when plaintiff bought. The court said in part:

> "* * * Cortelyou" (plaintiff) "with knowledge of the fact that the stock was thus issued, bought the same and consented that it should be evidenced by the certificates thus in the hands of Ferguson. The shares, as distinct from the evidences of ownership, were by such purchase vested completely in Cortelyou, and he became thereafter a shareholder to the extent of his purchase, and, under his agreement, entitled to have transferred to him the evidences of ownership. Ferguson did not hold the property of Cortelyou after the sale; that property, which was the shares and personal property, passed with the purchase and payment of money."

Head-note No. 1 in *Mason* v. *Lievre*, 145 Cal. 514 (1904), said:

> "An action may be maintained for the purchase price of certain shares of the stock of a corporation sold by plaintiff to the defendant, where it appears that, as the result of correspondence, there was a complete offer and acceptance for the purchase and sale thereof, with direction to the plaintiff to draw upon the defendant for the purchase money, without direction as to delivery, and that the plaintiff complied with such direction and set apart the stock for the use of the defendant, and requested information as to the mode of its issuance, and tendered the stock thereafter within a reasonable time. In such case

there was a completed sale of the stock, as to which an immediate delivery was not essential."

In its opinion the court said in part:

"Mr. Cook states the law thus: 'Generally a sale of stock is attended with an immediate delivery of the certificate therefor, or it is agreed that the certificate shall be delivered at some specified time in the future. If, however, the vendor offers to sell his stock and the vendee accepts the offer, the contract is complete and binds both parties, although nothing has been said as to the time when the certificate of stock shall be delivered. The law implies that the contract will be performed by a delivery of the certificates immediately or within a reasonable time and either party may insist upon carrying out the contract.' (Cook on Stock and Stockholders, sec. 334) * * * The rule of our code is, that 'The title to personal property sold or exchanged passes to the buyer whenever the parties agree upon a present transfer, and the thing itself is identified, whether it is separated from other things or not.' (Civil Code, sec. 1140). If title passes in such a case, it cannot be that delivery of the thing, simultaneously with payment, is necessarily of the essence of the transfer. * * *"

In the case at bar, not only was the stock paid for in California by the purchaser, but, in giving the seller a written order in California as to the disposition of the certificates, he executed a constructive, if not an actual, receipt for the said shares. But even assuming, *arguendo*, that the *Robbins* case has some applicability, there is grave doubt as to the soundness of that decision, as appears from the following comment in 26 Cal. Law Review, at page 266:

"There are no prior California cases squarely in point upon this subject * * * the principal decision

cannot stand unquestioned in view of the policy behind the act, *i. e.* to protect the buyer even to the extent of making shares issued in violation of the act void rather than voidable * * * what is left of that portion of the California Securities Act which states that no offers or negotiations to sell shall be made without a permit or the shares so issued shall be void. * * * The Court gave no effect to that part of the Act applying to offers and negotiations for a sale."

POINT IV.

The public policy of the State of California as enunciated by its Legislature in enacting the Corporate Securities Act should not be nullified by a strained reliance by the court on a highly technical point constituting the only ground given in support of the reversal in this case, viz. that a transaction otherwise constituting a California sale subject to its Corporate Securities Act is taken out of the protection of that Act by a direction by the buyer to the seller to send the property bought to the seller's office in another state for buyer's safekeeping account there.

CONCLUSION.

The petition for a writ of certiorari should be granted.

Dated: New York, September 25, 1942.

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